State Commission on Judicial Conduct

February 17, 2016

The Honorable Ken Paxton
Texas Attorney General
209 West 14th Street
Austin, TX 78701

Re: Request for Attorney General Opinion

Dear Mr. Attorney General:

As Executive Director of the State Commission on Judicial Conduct, I respectfully request a formal opinion from you on the following legal issue: Are the following courtroom prayer practices described in the three scenarios below lawful or does the practice in one or more of the scenarios violate the Establishment Clause of the First Amendment of the United States Constitution?

1. First Scenario: Before calling the court docket, the judge leads courtroom attendees in a religious[1] prayer or invocation, or invites a Chaplain to stand before the court and lead the attendees in such a prayer.

2. Second Scenario: Before the judge enters the courtroom to commence the judicial proceedings, courtroom attendees are instructed by a bailiff or a member of court staff that there will be an opening prayer or invocation and that those in attendance who object or are offended by the prayer may leave the courtroom and return when the prayer is over. The bailiff or court staff person represents to those in attendance that their cases will not be affected by their decision not to participate in the prayer. The judge does not enter the courtroom until those who choose not to participate in the courtroom prayer have exited, presumably to avoid an appearance of a lack of impartiality toward those who departed; however, those who elected to leave before the prayer must re-enter the

[1] The Commission's intent is to raise the question as to *any* religious prayer from any religion.

courtroom in order to have their cases heard and would be observed entering the courtroom by the judge at that time. In this instance, the opening prayer is also religious.

3. Third Scenario: The judge, a bailiff, or member of court staff opens court proceedings with either a moment of silence or a perfunctory acknowledgment of religion by stating words to the effect, "God save the State of Texas and this Honorable Court."

I have enclosed a brief addressing the legal and ethical issues posed by these scenarios.

Thank you in advance for your consideration of this matter. If you have any questions or concerns, or need additional information, please do not hesitate to contact me.

Sincerely,

ORIGINAL SIGNED BY

Seana Willing
Executive Director

SBW/sw
Attachment

BRIEF

TO: **The Honorable Ken Paxton**
Texas Attorney General

FROM: **Seana Willing, Executive Director**
State Commission on Judicial Conduct

DATE: **February 17, 2016**

SUBJECT: **Whether opening court proceedings with a religious prayer violates the Establishment Clause of the First Amendment to the United States Constitution**

The Establishment Clause and Courtroom Prayer

The First Amendment's Establishment Clause states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." Under the 14th Amendment to the United States Constitution, adherence to the restrictions of the Establishment Clause applies to all government action, including at the state and local level.[2]

Few courts, and no court in Texas, have been called upon to address the constitutionality of courtroom prayer. However, in 1991, the 4th Circuit Court of Appeals ruled in *North Carolina Civil Liberties Union Legal Foundation v. H. William Constangy*, 947 F.2d 1145 (4th Cir. 1991) that Judge Constangy should be enjoined from opening court with a prayer because "judicial prayer in the courtroom was not legitimated under the Establishment Clause by past history or present practice." Applying the three-part *Lemon* Test,[3] the Court found that Judge Constangy's prayer failed all three prongs: (1) the prayer resulted in "excessive government entanglement" with religious affairs (the "Entanglement" Prong); (2) it advanced religious practice (the "Effect" Prong); and (3) it did not have a secular legislative purpose (The "Purpose" Prong). The Court found that Judge Constangy's prayer did not qualify as mere "ceremonial deism," nor was it a perfunctory acknowledgment of religion such as "Under God," "In God We Trust," or "God save the United States and this Honorable Court." (citing *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 322-23 (2000); *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984)). In fact, it found that "an act so intrinsically religious as prayer cannot meet, or at least would have difficulty meeting, the secular purpose prong of the *Lemon* Test." *Constangy*, 947 F.2d at 1150.

The Court noted that it was required to apply the *Lemon* Test as opposed to the *Marsh* Test,[4] which it concluded applied only to legislative prayer. *Constangy*, 947 F.2d at 1147. The Court

[2] See *Everson v. Board of Education*, 330 U.S. 1, 15-18 (1947).

[3] In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the United States Supreme Court reviewed a Pennsylvania law that allocated public funds to reimburse the salaries of teachers at private (mostly parochial) schools for the purchase of text books and found it to be unconstitutional under the Establishment Clause of the United States Constitution. The Court laid out the three-prong test recited above, and found that if any prong is violated, government action is deemed unconstitutional under the Establishment Clause of the First Amendment. Although the *Lemon* Test has been criticized by members of the Court, it remains intact and regularly applied in Establishment Clause cases.

[4] In 1983, the United States Supreme Court ruled in *Marsh v. Chambers*, 463 U.S. 783 (1983), that legislative prayer itself, along with the practice of hiring a chaplain for the Nebraska state legislature, did not violate the Establishment

rejected Judge Contangy's argument that prayer by a judge is analogous to legislative prayer and, therefore, the Court should apply the *Marsh* Test. *Id.* at 1148. The Court contrasted prayer in the courtroom with legislative prayer and noted that "a judge's prayer in the courtroom is not to fellow consenting judges but to litigants and their attorneys." *Id.* at 1149. Moreover, the Court found that "because a judge must be a neutral decision maker, prayer in court by a judge has far more potential for establishing religion than legislative prayer," and that "for the judge to start each day with a prayer is to inject religion into the judicial process and destroy the appearance of neutrality." *Id.* at 1149-52.

Also of note is the fact that Judge Constangy had asserted arguments that his prayer had a secular purpose and that praying in court was his own personal prayer; however, the Court rejected these positions by concluding that prayer is "undeniably religious," and that a judge wearing a robe and speaking from the bench is "obviously engaging in official conduct." *Id*. at 1150-1151.

The Court also determined that Judge Constangy's intent was irrelevant; instead, how his prayer was perceived was the proper question to ask. *Id.* at 1151. According to the Court, persons who heard the judge's courtroom prayer felt the judge wanted them to join him in prayer and, therefore, felt the judge was endorsing religion, in violation of the Establishment Clause. *Id.* Finally, the Court expressed concern that Judge Constangy's prayer would lead to religious divisiveness, which it noted was among "the principal evils against which the First Amendment was intended to protect." *Id*. at 1152 (citing *Lemon*, 403 U.S. at 622). The Court found that Judge Constangy's practice not only offended nonbelievers, but also devout believers who regard prayer as personal and private, thus potentially entangling the state in divisiveness along religious lines. *Id.*

Determining what state-sponsored conduct would violate the Religious Clauses of the First Amendment and what does not is a complicated task.[5] In *Lynch v. Donnelly*, the Court found that a predominantly religious display located in a private park within the downtown shopping district would violate the First Amendment, but a display that combines religion along with secular elements to present a secular message would not. In this case, the Court compared Pawtucket, Rhode Island's 40-year tradition of displaying a crèche within a larger holiday exhibition to the display of religious paintings in government funded museums, as well as within the Supreme Court building itself.[6]

Clause of the First Amendment. Only focusing on legislative prayer and its "unique history," the Court concluded that the practice did not violate the Establishment Clause because of the historical acceptance of the practice. The Court also determined that the content of Nebraska's legislative prayer did not promote any one religion after the Chaplain promised to remove all references to "Jesus" in future prayers. In reaching this decision, the Court overruled the appellate court's decision that found, applying the *Lemon* Test, that all three prongs had been violated; however, the Court did not overrule the *Lemon* Test; instead, it simply ignored it.

[5] As Chief Justice Warren Burger noted in *Lynch*, "[i]n each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause 'was to state an objective, not to write a statute.'" The Chief Justice added that "[t]he line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.'" *Lynch*, 465 U.S. at 679 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970*); Lemon*, 403 U.S., at 614.)

[6] The Court also added an additional prong of "Endorsement," which has since become subsumed in the *Lemon* "Purpose" Prong. In her concurring opinion, Justice O'Connor explained that the "Endorsement" Test applies to laws wherein the government intends to convey a message of endorsement or disapproval of religion. *Lynch*, 465 U.S. at 688. This test is usually used in situations where the government is engaged in expressive activities, such as school graduation prayers, religious signs on government property, or religion in school curriculum.

By contrast, in *County of Allegheny et al. v. ACLU*, 492 U.S. 573 (1989), the Court criticized the majority decision in *Lynch* and found that a crèche displayed inside the county courthouse in Pittsburgh, Pennsylvania, violated the Establishment Clause of the 1st Amendment, because of the crèche's unmistakable religious message; whereas the display of a menorah next to a Christmas tree located outside the building did not because, in this particular setting, it conveyed a secular holiday message. Of significance is that the Court warned that a broad reading of *Marsh* "would gut the core of the Establishment Clause;" and that "*Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today." *Id.* at 602-04.

Most recently, the United States Supreme Court upheld the *Marsh* Test when it decided in *Town of Greece v. Galloway*, 134 S.Ct. 1811 (2014) that city councils were similar enough to state legislatures to allow the practice of opening a town meeting with prayer without violating the Establishment Clause. In its 5-4 decision issued in May 2014, the Court ruled that the practice was consistent with the tradition followed by Congress and state legislatures; the town did not discriminate against minority faiths in determining who may offer the prayer; and the prayer did not coerce participation with non-adherents.

It bears noting that the United States Supreme Court declined to hear Judge Constangy's appeal of the 4th Circuit Court's injunction. Also, in oral arguments before the Court in *Galloway*, both Justice Kagan and Justice Scalia discussed the appropriateness of courtroom prayer suggesting that it was neither a tradition nor appropriate. The final opinions in *Galloway* themselves do not address the practice of courtroom prayer in any context.

There are other cases of some significance that attempted to address the propriety of courtroom prayer surrounded a controversial judge from Alabama, Roy Moore. When Judge Moore was a Circuit Judge (1992-2000), he brought a wooden plaque depicting the Ten Commandments to court and hung it on the wall behind his bench. He also began each session of court with a prayer, asking for divine guidance over the deliberations of jurors. In 1995, a lawsuit was filed by the ACLU against Judge Moore claiming the display of the Ten Commandments plaque and his pre-session prayers were unconstitutional. That lawsuit was dismissed for lack of standing; however, the Alabama Governor and the Attorney General filed a suit for declaratory judgment in support of Judge Moore. In 1996, Circuit Court Judge Charles Price found that the pre-session prayers were unconstitutional, but allowed the display of the plaque. The Court also issued an order directing all Alabama judges to immediately "cease and desist" from the practice of conducting courtroom prayers and to take "all reasonable steps to prevent the conduct of unconstitutional prayer in the public courts" of the state. Thereafter, Judge Moore held a press conference asserting a religious intent in displaying the plaque. In response, Judge Price issued a new ruling requiring Judge Moore to remove the plaque within ten days. Judge Moore appealed the ruling but the appeal was dismissed on technical grounds in 1998.[7]

Recently, the State Commission on Judicial Conduct has been made aware of the fact that there are judges in Texas who open court proceedings with an overtly Christian prayer, some of

[7] As Chief Justice of the Alabama Supreme Court, in 2001, Judge Moore erected a 5,280 lb. granite block depicting the Ten Commandments and installed it in the central rotunda of the State Judiciary Building. The ACLU sued to have the monument removed (*Glassroth v. Moore*, 229 F.Supp. 2d 1290 (M.D. Ala. 2002)) and, in 2002, U.S. District Judge Myron Thompson declared the monument violated the Establishment Clause of the First Amendment, a ruling that was upheld by the 11th Circuit Court of Appeals applying the *Lemon* Test. (*Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. Ala., 2003). After Judge Moore announced his intent to disobey a court order to remove the monument, disciplinary action was commenced against him and he was eventually removed from office. The monument was moved to a private area of the Judiciary Building and eventually removed from the building a year later. In 2013, Judge Moore was re-elected to the Alabama Supreme Court as Chief Justice.

whom have characterized their practice as "a tradition," apparently in an effort to have this practice fall under the legislative prayer holdings of *Marsh* and *Galloway*; however, unlike legislative prayer, there is no similar long-standing tradition of opening courts with prayer, nor is there evidence that the Founding Fathers intended the Bill of Rights to apply to courtroom prayer. As the Court noted in *Allegheny*, "just because *Marsh* sustained the validity of legislative prayer, it does not necessarily follow that practices like proclaiming a National Day of Prayer are constitutional…Legislative prayer does not urge citizens to engage on religious practices, and on that basis could well be distinguishable from an exhortation from government to the people that they engage in religious conduct." *Allegheny*, 492 U.S. at 603 n. 52. It appears from *Constangy* that the proper test to apply to the practice of courtroom prayer is the *Lemon* Test, and that the practices described in Scenarios 1 and 2 above would likely fail some if not all prongs of that test.

An argument could be made that the danger posed by a judge's public display of religion in the courtroom, as described in Scenarios 1 and 2, is that the practice equates to official governmental endorsement or approval not just of religion, but of the Christian religion. This is something the United States Supreme Court has consistently held to violate the Establishment Clause. Additionally, despite an announcement to litigants that they can leave the courtroom if they choose not to participate or object to the prayer, the prayer practices in Scenarios 1 and 2 could still have a direct coercive effect on litigants, many of whom are not present in court by choice.[8] Objectively, it would appear axiomatic that anyone who would dare to leave the courtroom upon this announcement and return after the prayer when the judge is present is being placed in an untenable position. By exiting and then returning to the courtroom, the litigant runs the risk that he or she will possibly be noticed by the judge as having left the courtroom during the prayer and held up to ridicule, denigrated, or retaliated against by the judge or by the community for implying a rejection of the judge's Christian[9] religious beliefs.

At the same time, those who remain silent and choose to stay in the courtroom may be subjected to a court-sanctioned prayer and governmental endorsement of a religious belief other than their own, in violation of the Establishment Clause. The United States Supreme Court specifically addressed the dangers of this kind of endorsement, which "sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Lynch*, 465 U.S. at 688. (O'Connor, J., concurring). The Court has stated that government is prohibited from "making adherence to a religion relevant in any way to a person's standing in the political community." *Id.* at 687. The Commission is aware that some court attendees, including attorneys, have articulated that the prayer practices outlined in Scenarios 1 and 2 made them feel like outsiders and that their standing in the community, or ability to practice law in the community, would be placed at risk as a direct result of their criticism of this practice.

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[8] Courts are more likely to find a violation of the Establishment Clause in instances such as this where the government has an opportunity to influence what is essentially a "captive audience." For example, in 1992 the Court applied a "coercion" test to strike down school-led prayer by invited clergy at a middle school graduation even though attendance was not strictly compulsory (*Lee v. Weisman*, 505 U.S. 577 (1992)) and in 2000, it struck down the traditional practice of student-led prayer at school sponsored events. (*Santa Fe v. Doe*, 530 U.S. 290 (2000)). In each instance, over arguments that student attendance or participation was not compulsory, the Court held that schools should not force such a difficult choice on students as "it is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Santa Fe*, 530 U.S. at 312 (citing *Lee*, 505 U.S. at 596).

[9] The same argument would hold true regardless of the sectarian nature of the prayer.

Even if a judge were not influenced by a litigant's decision not to participate, that judge cannot avoid the *perception* that his/her decisions and rulings might be based on something other than the facts, evidence, and law. In fact, it would seem more likely than not that the decision to stay and participate in the prayer versus exiting the courtroom and returning later would be based in large part on a perception or belief that the judge's ruling would somehow be influenced by the litigant's level of participation. Using an objective, reasonable person standard, it would be difficult to conclude that even a non-mandatory prayer ceremony is not coercive, which in turn could also violate the Free Exercise portion of the Establishment Clause.

By contrast, the practice described in Scenario 3, which is similar to the manner by which the United States Supreme Court and the Texas Supreme Court open their proceedings[10], has been explicitly approved by the same courts that have found the other examples of courtroom prayer unconstitutional. *Constangy*, 947 F.2d at 1150; *Santa Fe ISD v. Doe*, 530 U.S. at 322-23; *Lynch* 465 U.S. at 693. Such an announcement, without any other entreaty to others to join or participate in a particular prayer (of any religious denomination), does not offend the Religious Clauses of the First Amendment as its "reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions." *Lynch*, 465 U.S. at 682 (citing *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961)). In fact, as the Court went on to note in *Lynch:*

> "whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums." *Id*. at 683.

In reaching this conclusion, the Court has consistently found that "total separation [of church and state] is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." *Id.* at 672 (Citing *Lemon*, 403 U.S. at 614.) More specifically, the Court stated:

> "In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible." *Id.*

In light of this clear precedent, it would appear safe to conclude that, unlike the courtroom prayer practices described in Scenarios 1 and 2, a court's announcement, "God save the State of Texas and this Honorable Court," would not violate the Establishment Clause of the First Amendment to the United States Constitution.

[10] In each instance, the Court Clerk makes this announcement before the commencement of proceedings.